INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

CASES:

Atlantic Coast Line R. Co. v. *Atlantic Bridge Co.*, 57 F. 2d 654	4
Black v. *Interstate Commerce Commission*, 167 F. 2d 825	5
Sonken-Galamba Corp. v. *Union Pac. R. Co.*, 145 F. 2d 808	4
Union Pacific Railroad Co. v. *United States*, 117 C. Cls. 757	5
Union Wire Rope Corp. v. *Atchison, T. & S. F. Ry. Co.*, 66 F. 2d 965, certiorari denied, 290 U. S. 686	5
United States v. *Gulf Refining Co.*, 268 U. S. 542	5
United States v. *M. K. & T. Railroad Co.*, 194 F. 2d 777	5
United States v. *Strickland Transportation Co.*, 200 F. 2d 234	3, 4, 6

INTERSTATE COMMERCE COMMISSION DECISIONS:

Airplane Engines Between Points in the Southwest, 43 M. C. C. 242	6
Airplane Engines in Official Territory, 258 I. C. C. 226	6
Released Ratings and Rates on Engines, 47 M. C. C. 767	6

MISCELLANEOUS:

Rule 29 of the Rules of the Court of Appeals for the Fifth Circuit	3

In the Supreme Court of the United States

October Term, 1953

No. 255

STRICKLAND TRANSPORTATION CO., INC., *Petitioner*

v.

THE UNITED STATES

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court for the Northern District of Texas (R. 89) has not been reported. The opinion of the Court of Appeals (R. 158-159) is reported at 204 F. 2d 325.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1953 (R. 160). The petition for a writ of certiorari was filed on August 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the internal combustion engines transported by petitioner, which were intended for use in airplanes, were properly classifiable for rate purposes as "Engines, steam or internal combustion, NOI" under the caption "Machinery, or Machines or Parts Named" rather than as "Aircraft Parts NOI," which move at much higher rates.

STATEMENT

The petitioner billed and the Government paid for shipments of internal combustion engines at the high rates for "Aircraft parts, N.O.I., other than cloth and metal or wood combined" in the National Motor Freight Classification tariff (Pet. App. A, p. 3). After audit, the Government claimed the benefit of rates applicable to agricultural implements or automobile parts and withheld the difference from other payments to petitioner.

Petitioner thereupon brought four suits in the District Court under the Tucker Act, which were tried together on a consolidated record (R. 32).

On March 14, 1952, the District Court sustained petitioner's contention that the engines in question were "airplane parts" and rendered judgments for petitioner (R. 25-6, 107-8, 129-30, 150-1). The Court of Appeals reversed on the authority of its prior decision in a precisely similar suit between the same parties, *United States* v. *Strickland Transp. Co.*, 200 F. 2d 234. The basis of that decision was that the engines in question, whether or not destined for use in aircraft, were specifically within the intermediate rate classification for "Engines, steam or internal combustion N.O.I. (not otherwise indexed)" under the general heading "Machinery, or Machines or Parts named" (R. 159).

By what is presumably inadvertence, the court below failed to include in its mandate a direction to enter judgment for the difference between the low rate paid and the intermediate rate determined. The Government did not dispute that this would leave a total of $3,891.25 due to petitioner over the amount actually paid (R. 74). Although petitioner made no application before the court below to resettle its mandate to make provision therefor and filed no petition for rehearing,[1] it urges the point now as error for the purposes of its petition.

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[1] See Rule 29 of the Rules of the Court of Appeals.

The Government, of course, would not have opposed, and will not oppose, correction of the error by any proper proceeding in the courts below.

ARGUMENT

In an identical suit between the same parties, *United States* v. *Strickland Transp. Co.*, 200 F. 2d 234, 235, the court below has held that (a) the internal combustion engine tariff description "more precisely describes and better fits the shipments in question than does the rating for which appellee [petitioner] contends; that, in short, it is more specific and, therefore, the controlling rating;" (b) that even if it be considered that the shipments in question could fall equally under either of the two classifications, "the shipper was entitled to the 'Machinery or Machines' classification because the rate prescribed by it is the lower," since if an ambiguity was present, it would have to be resolved in favor of the shipper.

That decision, which was the basis of the holding in the instant case, is in accord with sound and conventional principles of tariff construction in holding applicable those rates which a fair reading of the tariff would lead a shipper to believe were being held out to it *Atlantic Coast Line R. Co.* v. *Atlantic Bridge Co.*, 57 F. 2d 654, 655, 656 (C.A. 5); *Sonken-Galamba Corp.* v. *Union Pac. R. Co.*, 145 F. 2d 808, 810 (C.A. 10). The low rate could only be withheld and rates in excess of the first class rate imposed in accordance with petitioner's billings (R. 5, 54, 92, 114, 135) by charging shippers with notice of the carriers' uncommunicated intentions. The critical question is not the car-

riers' subjective intent but what their published tariffs mean to the shippers to whom they are addressed. *Union Wire Rope Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 66 F. 2d 965, 967 (C.A. 8), certiorari denied, 290 U.S. 686; *United States* v. *M. K. & T. Railroad Co.*, 194 F. 2d 777, 778-9 (C.A. 5).

As noted by the court below (R. 159), the rating on internal combustion engines is more specific than the rating for the residual, indefinite and fluctuating category of aircraft parts not otherwise indexed. Cf. *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757, 764. But if there were an ambiguity in the tariff and if it were not evident under which rating the shipments fell, the ambiguity would still have to be resolved in favor of the shipper. "Where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates." *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 546.

Claiming that the application of this clearly governing rule to the particular facts of this case should be reviewed by this Court, petitioner asserts that the decision below is inconsistent with rulings of the Interstate Commerce Commission (Pet. 9).[2]

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[2] Petitioner also claims that the decision below conflicts with the prior decision of the same court in *Black* v. *Interstate Commerce Commission*, 167 F. 2d 825. Apart from the fact that this contention presents no "conflict" of the kind requiring resolution by this Court, it is clear that the *Black*

But the assertion is without basis. A long line of Commission authority holds that a higher rate for airplane engines than for other types of internal combustion engines is legally indefensible. *Airplane Engines in Official Territory,* 258 I.C.C. 226; *Released Ratings and Rates on Engines,* 47 M.C.C. 767; *Airplane Engines Between Points in the Southwest,* 43 M.C.C. 242, 244, 245;[3] see *United States* v. *Strickland Transp. Co.,* 200 F. 2d 234, 236 (C.A. 5). In the many years engines for use in airplanes have been transported in commerce, the claim has not previously been made that they were ratable as airplane parts. On the contrary, the reports contain many references to the prevailing view that airplane engines are rated as internal combustion engines. See, *e.g. Airplane Engines*

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decision is wholly inapposite here. That case involved the interpretation of a certificate of necessity and convenience in a suit brought by the Commission, and not, as here, a tariff dispute between shipper and carrier. There, at any rate, the holding that automobile parts could not be carried under the general heading "Machinery" was in large part based upon the fact that there was no specific item under the "Machinery" classification to describe them. On the other hand, as noted by the court below in the first *Strickland* decision (204 F. 2d at 235, 236), internal combustion engines, involved here, are precisely described under the sub-head of the "Machinery" category but not under the caption of "Aircraft and Aircraft Parts" on the basis of which petitioner's claim was made.

[3] The Commission in the authorities cited has found that "airplane engines" are interchangeable, adaptable for other uses, and not a separate and distinct breed. See also R. 50.

Between Points in the Southwest, 43 M.C.C. 242, 243.

CONCLUSION

The decision below, which correctly applies the proper principles of carrier tariff classification, plainly does not warrant review by this Court. It is respectfully submitted that the petition for writ of certiorari should be denied.

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